

In The
Court of Appeals
Fifth District of Texas at Dallas

.....
No. 05-11-00326-CV

.....
ADRIAN OGUNFEYIMI, Appellant
V.
GEORGE CHARALAMBOPOLOUS AND DREAMS, INC., Appellees

.....
On Appeal from the 101st District Court
Dallas County, Texas
Trial Court Cause No. 09-01839-E

.....
MEMORANDUM OPINION
Before Justices Lang, Murphy, and Myers
Opinion By Justice Myers

Adrian Ogunfeyimi appeals the dismissal for want of prosecution of his suit against George Charalambopolous and Dreams, Inc. Appellant brings three issues asserting the trial court erred by dismissing the case for want of prosecution and by refusing to reinstate the case. We affirm the trial court's judgment.

BACKGROUND

In February 2009, appellant filed this suit against appellees, alleging he was a customer in a bar owned by Dreams, Inc. when he was injured by an employee of the bar who punched appellant, breaking appellant's jaw. Charalambopolous was the president of Dreams, Inc. In September 2010, the case was set for a jury trial on January 4, 2011. The trial court sent the parties a letter providing notice of the trial setting: Please take note of the following settings:
Jury Trial: 01/04/2011 @ 9:00 am
Trial announcements must be made in accordance with rule 3.02, Local Rules of the Civil Court of Dallas County, Texas.

When no announcement is made for Defendant, Defendant will be presumed ready. If no [sic] Plaintiff fails to announce or to appear at trial, the case will be dismissed for want of prosecution in accordance with rule 165a, Texas Rules of Civil Procedure.

(Original in all capitals.) See Footnote 1 Local rule 3.02 concerns trial announcements: (a) In all cases set for trial in a particular week, counsel are required to make announcements to the Court Administrator on the preceding Thursday and in any event, no later than 10:30 A.M. on the preceding Friday concerning their readiness for trial.

...
(b) If Plaintiff does not make an announcement by 10:30 A.M. on Friday preceding the week in which the case is set for trial, the Court may dismiss the case for want of prosecution.

Dallas (Tex.) Civ. Dist. Ct. Loc. R. 3.02(a), (b). In this case, the Friday preceding trial was December 31, 2010. Appellant did not make the required announcement, and the trial court dismissed the case for want of prosecution under rule 165a and under the court's inherent power. See Footnote 2 Appellant appeared at the court with his witnesses on January 4, 2011 and was told the case had been dismissed the previous Friday. Appellant timely filed a motion to reinstate, stating he

did not receive notice of the court's intent to dismiss under rule 165a for failure to announce ready for trial, he did not receive notice of a dismissal hearing under rule 165a, the court dismissed without holding a hearing under rule 165a, and appellant had prosecuted the case with due

diligence. At the hearing on the motion to reinstate, appellant's attorney acknowledged receiving the notice of trial setting and reading the requirement of an announcement. Appellant's attorney told the court that "no notice of any kind of dismissal hearing was ever sent to plaintiff's counsel." He also stated that the case "was set for trial around the Christmas holidays and also the New Year's holiday. We didn't think-or we actually did not make an announcement of ready in the case, but certainly there hasn't been any kind of failure to prosecute the case." The court denied the motion to reinstate.

DISMISSAL FOR WANT OF PROSECUTION

In his first issue, appellant contends the trial court erred by denying appellant's motion to reinstate because appellant's counsel offered an excuse for the failure to make a pretrial announcement. Texas Rule of Civil Procedure 165a provides, A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice. Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record, and to each party not represented by an attorney and whose address is shown on the docket or in the papers on file, by posting same in the United States Postal Service. At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket.

Tex. R. Civ. P. 165a(1). A trial court may exercise its discretion to

dismiss for want of prosecution under either rule 165a or its inherent power. *Villareal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999); *Veterans' Land Board v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976) (per curiam). We review a trial court's dismissal for want of prosecution under a clear abuse of discretion standard. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997) (per curiam); *Bridwell v. Mulder*, 315 S.W.3d 657, 659 (Tex. App.-Dallas 2010, no pet.). A trial court abuses its discretion when it acts without reference to any guiding rules or principles, i.e., when its act was arbitrary or unreasonable. See *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

When a case is dismissed under rule 165a, a party may move for reinstatement within thirty days after the order of dismissal is signed. Tex. R. Civ. P. 165a(3). Rule 165a(3) states, "The court shall reinstate the case upon finding after a hearing that the failure to of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." Tex. R. Civ. P. 165a(3). "Some excuse, not necessarily a good one, is sufficient." *Seigle v. Hollech*, 892 S.W.2d 201, 203 (Tex. App.-Houston [14th Dist.] 1994, no writ) (quoting *Mayad v. Rizk*, 554 S.W.2d 835, 838 (Tex. Civ. App.-Houston [14th Dist.] 1977, writ ref'd n.r.e.)).

Appellant argues the trial court erred by denying the motion to reinstate because the notice of dismissal failed to meet the

requirements of rule 165a in that the notice did not provide for a hearing before dismissal and did not state the case would be dismissed without a hearing. The trial court is required by rule 165a to provide notice of a hearing and conduct an oral hearing before dismissal. *Villareal*, 994 S.W.2d at 630; *Franklin v. Sherman Indep. Sch. Dist.*, 53 S.W.3d 398, 401 (Tex. App.-Dallas 2001, pet. denied) (per curiam).

However, deficiencies in the notice of dismissal and the failure to hold a hearing before dismissal are harmless if the trial court holds a hearing on a motion to reinstate and provides the party the same hearing with the same burden of proof it would have had before the order of dismissal was signed. *Finlan v. Peavy*, 205 S.W.3d 647, 654, 655-56 (Tex. App.-Waco 2006, no pet.); *Franklin*, 53 S.W.3d at 402-03; *Jiminez v. Transwestern Prop. Co.*, 999 S.W.2d 125, 128-29 (Tex. App.-Houston [14th Dist.] 1999, no pet.).

In this case, appellant received the same type of hearing with the same burden of proof at the hearing on the motion to reinstate. Accordingly, any error from defects in the dismissal notice and from the court's failure to hold a hearing before dismissal were harmless. At the hearing on the motion to reinstate, appellant provided no excuse for his failure to follow the court's requirement to announce in accordance with the local rule. During the hearing, the trial court asked appellant's counsel if anything in his motion to reinstate established that his failure to announce "was not intentional or the result of conscious

indifference but was due to accident or mistake." Appellant's counsel stated, "Well the fact of the matter is no notice of any kind of dismissal hearing was ever sent to plaintiff's counsel." The trial court then observed, "you have offered no excuse for failing to comply with it [the announcement rule]." The failure to follow the notice and hearing requirements of rule 165a does not require reinstatement when a party receives a hearing on a motion to reinstate. See *Franklin*, 53 S.W.3d at 404.

Appellant asserts the trial court's failure to follow rule 165a before dismissal constitutes a reasonable explanation under rule 165a(3) and required the court to reinstate the case. We disagree. For a dismissal under rule 165(a)(1), the "reasonable explanation" must be for the parties' failure to appear at a hearing or trial as required by the court. See Footnote 3 That the party failed to receive notice of a dismissal hearing for failing to follow the requirement is not an excuse for failing to fulfill the requirement. See *Franklin*, 53 S.W.3d at 403-04.

Appellant also argues, "Plaintiff's counsel indicated the belief that an announcement was not necessary since the announcement date was the New Year's Eve holiday." Appellant's counsel did not make that argument at the hearing on the motion to reinstate. Instead, he stated that the case "was set for trial around the Christmas holidays and also the New Year's holiday. We didn't think-or we actually did not make an announcement of ready in the case, but certainly there hasn't been any

kind of failure to prosecute the case." Appellant's counsel never told the court he believed an announcement was not necessary on New Year's Eve. Appellees' counsel stated that New Year's Eve "was a holiday weekend for many," and she announced early because of that. Appellees' counsel never stated that New Year's Eve was a holiday or that announcement on that day was not required by the local rule and the trial court's notice. Furthermore, New Year's Eve is not a holiday. See *Tex. Gov't Code Ann. § 662.003* (West 2004) (listing national and state holidays).

Appellant argues this case is similar to *Summons v. Herrington*, No. 05-00-00664-CV, 2001 WL 641997 (Tex. App.-Dallas Jun. 12, 2001, no pet.) (not designated for publication). See Footnote 4 In that case, the plaintiff's case was dismissed when the plaintiff's counsel failed to appear at a trial setting. At the hearing on the motion to reinstate, the plaintiff's counsel presented evidence that he had conflicting trial settings in other courts of which he had informed the trial court and that the court coordinator had assured him the case would not be reached for trial that day. This Court concluded that the trial court abused its

discretion in denying the motion to reinstate because the plaintiff's delay "was not intentional or due to conscious indifference and a reasonable explanation was offered for his delay." Id. at *4. Summons is distinguishable because counsel in that case proffered a reasonable explanation for not appearing at trial: conflicts with trial settings in

other courts about which he informed the trial court, and the court coordinator's assurance that the case would not be reached that day. In this case, appellant proffered no reasonable explanation for failing to announce. Appellant has not shown that his failure "was not intentional or the result of conscious indifference but was due to an accident or mistake." See Tex. R. Civ. P. 165a(3). Nor does appellant provide any other explanation for failing to comply with the court's directions. Accordingly, we conclude the trial court did not abuse its discretion by denying appellant's motion to reinstate after dismissing the case under rule 165a. We overrule appellant's first issue. In his second and third issues, appellant contends the trial court erred by dismissing the case under its inherent authority. Because we have concluded appellant has not shown the trial court abused its discretion by failing to reinstate the case under rule 165a(3), we need not address whether the trial court erred by dismissing under its inherent authority. See Tex. R. App. P. 47.1 (court's opinion must address every issue raised and necessary for disposition of appeal). We affirm the trial court's judgment.

LANA MYERS
JUSTICE
110326F.P05

Footnote 1

The double negative wording, "If no [sic] Plaintiff fails to announce or to appear at trial, the case will be dismissed for want of prosecution," literally meant the case would be dismissed if plaintiff announced or appeared at trial. Such a result would be absurd, and

appellant did not argue any confusion from the notice's unusual wording.

Footnote 2

The trial court's order of dismissal stated: Plaintiff, having failed to take certain actions heretofore specified by the Court within the time period prescribed, and for failing to announce for trial scheduled for January 4, 2011, the Court has determined that this cause should be dismissed for want of prosecution pursuant to Texas Rules of Civil Procedure 165a and the Court's inherent power. IT IS THEREFORE ORDERED THAT this cause is hereby dismissed without prejudice.

Footnote 3

Appellant did not assert in the trial court or on appeal that the announcement requirement is not a "hearing or trial." Because appellant did not argue in the trial court or on appeal that rule 165a(1) does not apply to the announcement requirement, we make no determination of that issue. See Tex. R. App. P. 33.1.

Footnote 4

Because Summons was not designated for publication and was decided before January 1, 2003, it has no precedential value. See Tex. R. App. P. 47.7(b).

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